United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: June 30, 2010

TO : Wayne Gold, Regional Director

Region 5

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Gaylord National Hotel and Convention Center

Case 5-CA-35330

512-5012-8300 512-5072-0400 512-5072-3900

This case was submitted for advice as to whether the Gaylord National Hotel and Convention Center ("Gaylord") violated Section 8(a)(1) of the Act when it called the police to remove picketers. We conclude that Gaylord did not violate the Act because it had a reasonable concern that the picketers had trespassed on its property. Accordingly, the charge should be dismissed, absent withdrawal.

FACTS

The Peterson Companies ("Peterson") began developing the National Harbor site around 2000, buying property through two subsidiaries. In 2005, Gaylord purchased approximately 23 acres for its hotel and convention center from one of Peterson's subsidiaries. Gaylord developed that property and now operates a luxury hotel and convention center located at 201 Waterfront Street in the National Harbor complex in Oxon Hill, Maryland. In addition to the Gaylord, the National Harbor complex includes restaurants, private condominiums, shops, and other hotels.

On three occasions, 1 the Mid-Atlantic Regional Council of Carpenters, Local Union 491 ("Union") picketed outside the Gaylord because it had determined that contractors setting up exhibits inside the Gaylord convention center were not paying area standards wages. The picketers were not Gaylord's employees.

¹ The Union withdrew an allegation concerning a picket on September 2, because it occurred on property that appears to be owned by Gaylord.

The November picket

On the morning of November 10, 2009, 50 to 60 Union supporters established an area standards picket outside the Gaylord on a portion of the Waterfront Street sidewalk, which is in front of the main entrance to the hotel and is situated between two driveway entrances to the hotel. The picketers established a single-file line and walked up the length of the sidewalk, turned around an orange road cone, and then walked back down the sidewalk in the opposite direction. During the picketing, the picketers did step onto the grassy areas surrounding both sides of the sidewalk. The Union parked a truck on Waterfront Street with an inflatable rat perched in the bed. A video of the picket does not show any interference with vehicular traffic on the road, or that any pedestrians were forced off the sidewalk into the road. In the approximately thirty minutes of video, 2 the union's truck and a police car were the only vehicles that passed in front of Gaylord.

After learning of the picket, Gaylord's Director of Security called the police. When the police arrived, one of the officers instructed the Union to move the truck and the Union complied. This officer also told the Union Business Agent that they would have to leave if the Union were on private property. The Business Agent showed the officer a county zoning map and, after reviewing the map, the officer told him that the Union could stay, as long as they did not impede access to the hotel. Later, a second officer approached the Business Agent and asked to see the zoning map. After reviewing the map, the second officer told the Union that it could stay, as long as the picketers were not too loud.

Less than a half hour later, a third officer approached the picket line. This officer also looked at the zoning map, and then told the Union that the picketers had to leave or would be arrested because Gaylord and Peterson considered the property to be private. According to the Union, Gaylord's Director of Security also told the Business Agent that he did not care what the map said, he wanted the protesters to leave. The Union and picketers left the property.

The January picket

On January 6, 2010, the Union picketed in the same location as it had in November. An officer arrived at the scene and informed the Union that Gaylord had called the police to remove the picketers from its private property.

² It appears that the video does not cover the entire duration of the picketing on this day.

A few minutes later, a second officer joined the first officer, and they conferred with Gaylord's Director of Security. The second officer informed the Union that, after conferring with Gaylord and Peterson, they had determined that the property between the sidewalk and the Gaylord hotel was Gaylord property; from the sidewalk to the street, the property belonged to Peterson. The officer also told the Union that Gaylord wanted them arrested if the picketers encroached on its property, that Peterson also did not want the picketers on its property, and that he would arrest them if they did not disband.³

Gaylord contends that the Union's picket line created a potentially hazardous situation because it forced pedestrians into the street and blocked traffic on Waterfront Street. The Union denies that it interfered with vehicular or pedestrian traffic.

Gaylord also asserts that it owns the sidewalk because it pays property taxes on it. The Prince George's County Police Law Office made a preliminary determination that the entire Gaylord National Hotel and Convention Center is private property, but contends it is still investigating the question. The Prince George's County Department of Public Works and Transportation ("Public Works") provided an engineering drawing of the Gaylord complex that shows a sixty foot public right-of-way covering the entirety of the property where the Union picketed in November and January. A Public Works engineer confirmed that the public right-of-way includes the street, the sidewalks, and the grassy areas on both sides of the sidewalk.

ACTION

We conclude that Gaylord did not violate Section 8(a)(1) by summoning the police because, although Gaylord did not have a reasonable concern about public safety, it did have a reasonable concern that the Union picketers were trespassing on its private property. Accordingly, the Region should dismiss the complaint, absent withdrawal.

An employer may seek to have the police take action against pickets where the employer is motivated by a "reasonable concern," such as public safety or interference with its legally protected interests.⁴ As long as the

³ The Union also filed a charge against Peterson. That charge was recently submitted to Advice and will be addressed in a separate memorandum.

⁴ Nation's Rent, Inc., 342 NLRB 179, 181 (2004) (trespass by picketers), citing Great American, 322 NLRB 17, 21 (1996) (handbilling causing interference with vehicular traffic).

employer "is acting on the basis of a reasonable concern, Section 8(a)(1) is not violated merely because the police decide that, under all the circumstances, taking action" is unwarranted. 5

Here, Gaylord did not have a reasonable concern about public safety because there is no objective evidence that the picketers were stepping into the streets, distracting drivers, causing pedestrians to step into the streets, or otherwise potentially causing a public safety issue. In fact, the video of the picketing activity—albeit only 30 minutes in length—shows only two vehicles passing by the Gaylord during those thirty minutes and does not show anyone stepping into the streets. Accordingly, we conclude that Gaylord did not have a reasonable concern about public safety when it summoned the police. The streets is no objective evidence about public safety when it summoned the police.

However, we conclude that Garylord did have a reasonable concern that the picketers were trespassing on its private property, notwithstanding that the best evidence obtained in the investigation indicates that the pickets were not on Gaylord's private property. The Department of Public Works provided an engineering drawing that shows there is a sixty-foot public right-of-way covering the entirety of the property where the Union picketed in November and January; and a Public Works engineer confirmed that the public right-of-way includes the street, the sidewalks, and the grassy areas on both sides of the sidewalk. Moreover, even if the property where the Union picketed is private property, the weight of the evidence suggests that it belongs to Peterson rather than Gaylord. Nevertheless, because of the general uncertainty at the time of picketing regarding the width of

Accord Sprain Brook Manor Nursing Home, LLC, 351 NLRB 1190, 1191-1192 (2007).

⁵ Nation's Rent, 342 NLRB at 181 (employer had reasonable concern justifying call to police where pickets were trespassing on private property, using a police scanner, and following employees as they left the employer's facility).

⁶ Compare <u>Great American</u>, 322 NLRB at 20-21 (employer lawfully summoned police to evict handbillers where they stopped traffic and caused it to back up into the street, creating potentially dangerous traffic conditions and infringing on the employer's property rights by preventing customers from entering the lot unimpeded).

⁷ See, <u>Sprain Brook Manor Nursing Home</u>, 351 NLRB at 1191 (summoning police unlawful where employer failed to present any evidence of traffic or safety problems).

the public right-of-way, Gaylord had a reasonable concern that the picketers were trespassing on its private property. At the November picket, the police did not reject Gaylord's assertion that the area was private property, notwithstanding that the Union showed the zoning map to the officers. And at the January picket, after conferring with Gaylord and Peterson representatives, the police determined that the property between the sidewalk and the Gaylord hotel was Gaylord property, and from the sidewalk to the street, the property belonged to Peterson. Additionally, the police department's law office determined as a preliminary matter that the property involved was private property, and Gaylord pays taxes on the property. Accordingly, in light of the confusion at the time of the picketing and the continuing uncertainty during the Region's investigation, Gaylord's concern that the pickets were trespassing on its private property was at least reasonable.

Therefore, because Gaylord had reasonable concern that the picketers were trespassing on its property, it did not violate the Act when it called the police on November 10 and January $6.^8$ Accordingly, the Region should dismiss, absent withdrawal, the charge that Gaylord unlawfully summoned the police.

B.J.K.

 8 In light of our conclusion that Gaylord was privileged to call the police, under Board law, because of its reasonable concern that picketers were trespassing, we do not address the issue left unresolved by Venetian Casino Resort, L.L.C. v. NLRB, 484 F.3d 601, 610, 614 (D.C. Cir. 2007), cert. denied 2008 WL 695634 (Mar. 17, 2008), i.e., whether summoning the police is First Amendment protected petitioning of the government, subject to analysis under BE&K Construction Co., 351 NLRB 451 (2007).